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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALEX JOSEPH PEDRIN, Appellant.	2 CA-CR 2007-0087 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20022147

Honorable Ted B. Borek, Judge

AFFIRMED IN PART; REVERSED IN PART

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Alex Pedrin was convicted of five counts of aggravated assault, two counts of first-degree burglary, and one count each of conspiracy, kidnapping, armed robbery, aggravated robbery, fleeing from a law enforcement vehicle, possession of a deadly weapon by a prohibited possessor, theft, and attempted first-degree murder. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 110.5 years. On appeal, he raises a number of issues that he contends require the reversal of his convictions and sentences. For the reasons below, we affirm in part and reverse in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Cruz*, 218 Ariz. 149, n.1, 181 P.3d 196, 202 n.1 (2008). Late one evening in June 2002, Pedrin and two other men, wearing ski masks and "military-type garb" and carrying handguns, assembled outside the home of H., who had chronic health problems and was confined to a wheelchair. H. and his friend and caretaker, S., were inside, watching television in the living room when Pedrin and his cohorts kicked in a side door and stormed the home. They threw H. and S. to the floor, bound their hands behind their backs with plastic tie straps, and placed duct tape over their mouths. One of them hit and kicked H. and used a taser gun to repeatedly shock both victims while demanding "drugs and money" and the keys to H.'s vehicle. H. told the men the car keys were "hanging up" but he did not have any drugs or money. After ransacking the home for approximately fifteen minutes, the

invaders left in H.'s vehicle, a Ford Taurus, taking with them some jewelry and approximately sixty guns from H.'s gun collection.

¶3 S. untied herself and called 911. As Tucson Police Officer Wallen was responding to that call, he received information about "suspicious activity involving . . . three males loading guns from a Taurus to a Bronco-type vehicle" in the parking lot of an apartment complex near H.'s home. Wallen drove there and encountered "head-on" a Chevy Blazer as it was leaving the complex. Pedrin, who was driving the Blazer, "ma[de] an immediate turn, jump[ed] the curb and dr[ove] around [Wallen]."

¶4 Wallen activated his lights and siren, and a high-speed chase ensued through midtown Tucson. After traveling about four miles, the occupants of the Blazer began to fire rounds from both the driver- and passenger-side windows at Wallen and four other patrol cars that had joined the pursuit, eventually disabling Wallen's vehicle. After approximately half an hour of pursuit at speeds reaching eighty miles per hour, the Blazer drove into a cul-de-sac and struck a fence. Pedrin jumped from the car and ran but was soon apprehended with the help of a K-9 unit. The other two men remained in the Blazer and were immediately arrested. Police officers found ski masks, military-style clothing, plastic ties, duct tape, a taser gun, ammunition, and H.'s guns and jewelry inside the Blazer.

¶5 In July, Pedrin was charged with four counts of attempted murder, two counts of first-degree burglary, two counts of aggravated assault with a deadly weapon, and one count each of possession of a deadly weapon by a prohibited possessor, conspiracy,

kidnapping, armed robbery, aggravated robbery, theft by controlling stolen property, theft of means of transportation, and fleeing from law enforcement. On the seventh day of trial, the court granted the state's motion to dismiss the charge of theft of means of transportation. Pedrin was convicted of all remaining counts, except the jury found him guilty of the lesser included offense of aggravated assault for three of the attempted murder charges. He was sentenced as described above, and this appeal followed.[1]

Motion for Mistrial

¶6 On the morning of the seventh day of trial, Pedrin attempted to escape from police custody while being transported from the jail to the courthouse. That evening, there were several television news reports about the incident, and it was reported in local newspapers the next morning. The following day, juror P. told the bailiff he had read an article about Pedrin's attempted escape in the morning newspaper. The trial court then questioned P. out of the presence of other jurors. P. stated he had learned that Pedrin had "tr[ied] to flee or something" the previous morning and that Pedrin had "been in jail before." He said he had not discussed the article with the other jurors.

¶7 The trial court then questioned the remaining jurors about whether they had "seen or heard anything in the paper, or on the radio, anything about [the] case." Five jurors indicated they had, and each was questioned individually about what he or she had learned. Three of those jurors stated they had heard Pedrin's name mentioned on the television the

[1]Pedrin was twice granted leave to file a delayed appeal.

previous night but had learned nothing "other than the fact his name was mentioned on television." The other two, however, said they had learned that Pedrin had attempted to escape—one had watched a television news report about the incident and the other had been told about the incident by her husband.

¶8 Defense counsel moved for a mistrial, claiming the jurors had been "unequivocally tainted by what they [had] heard." He requested in the alternative that juror P. and the two jurors who learned that Pedrin had tried to escape be dismissed from the jury. The trial court denied the mistrial but dismissed juror P., stating: "I think he read a little bit too far." The court found the other five jurors had, at most, "just heard about [the attempted escape]" and "any problem" could be remedied by instructing the jury that news coverage "is not evidence and may not be considered . . . for any purpose." Prior to closing arguments, the jurors were so instructed.

¶9 Pedrin now contends the court erred in denying a mistrial. Generally, a mistrial may be warranted when jurors are exposed during the course of trial to "extraneous evidence [that is] prejudicial to the defendant . . . by way of the news media." *State v. Chambers*, 102 Ariz. 234, 236, 428 P.2d 91, 93 (1967). The danger is that such exposure will "cast an irrevocable cloud over the jury's fairness and impartiality." *State v. Reynolds*, 11 Ariz. App. 532, 535, 466 P.2d 405, 408 (1970). "The trial judge has a large [amount of] discretion in ruling on the issue of prejudice resulting from the reading [or viewing] by jurors of news [media] concerning the trial." *Marshall v. United States*, 360 U.S. 310, 312 (1959).

"Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Id.*

¶10 We cannot say the trial court abused its discretion here. The court dismissed juror P., who was the only juror who had learned that Pedrin had a criminal history. Of the other five jurors exposed to media accounts associated with Pedrin's attempted escape, three had merely heard Pedrin's name mentioned on the television. Although two jurors learned that Pedrin had attempted to escape, we cannot say knowledge of this fact necessarily would "cast an irrevocable cloud over [their] fairness and impartiality." *See Reynolds*, 11 Ariz. App. at 535, 466 P.2d at 408. The trial court asked each of the five jurors whether they could set aside what they had heard and decide the case on the facts presented at trial, and they all answered affirmatively. The trial court was in the best position to assess their demeanor and credibility, and we defer to its determination. *See State v. Roque*, 213 Ariz. 193, ¶ 102, 141 P.3d 368, 395 (2006).

¶11 Pedrin cites several cases in which courts have found the defendant entitled to a new trial on the ground jurors had been exposed during the trial to extraneous, prejudicial information about the defendant. But in each of those cases, the extraneous information revealed the defendant's otherwise inadmissible prior criminal history. *See Marshall*, 360 U.S. at 311-13 (jurors saw newspaper article that mentioned defendant's two prior felony convictions, which trial court had previously precluded); *State v. Martinez*, 109 Ariz. 303, 303-04, 508 P.2d 1165, 1165-66 (1973) (clerk of court inadvertently read defendant's prior

convictions to jurors); *State v. Skinner*, 108 Ariz. 553, 553-54, 503 P.2d 381, 381-82 (1972) (two jurors read newspaper article that referred to defendant's prior conviction for murder). These cases do not help Pedrin because, as noted above, the trial court dismissed the only juror who had learned about Pedrin's prior criminal history.

¶12 Pedrin also contends the court abused its discretion by denying his request to dismiss the two jurors who had learned he had attempted to escape, a decision we review for an abuse of discretion. *See Roque*, 213 Ariz. 193, ¶ 102, 141 P.3d at 395. Pedrin points out that the trial court had empaneled alternate jurors who could have replaced the jurors who were aware of the escape attempt "to ensure a fair and impartial jury." Indeed, that might have been a wise course. *See State v. Comer*, 165 Ariz. 413, 431, n.1, 799 P.2d 333, 351, n.1 (1990) (Corcoran J., specially concurring) ("I cannot glean from the record why the trial judge worked so hard to try to rehabilitate and ultimately retain these two prospective jurors" who had closely followed news coverage of the defendant's alleged crimes.) But, even assuming without deciding that the trial court erred in refusing to dismiss those jurors who had become aware of the escape attempt, we cannot say this affected the outcome of the trial or otherwise prejudiced Pedrin. *See State v. Newell*, 212 Ariz. 389, ¶ 70, 132 P.3d 833, 847 (2006).

¶13 Evidence admitted at trial established Pedrin had attempted to flee from officers before he was apprehended, leading them on a high-speed chase through downtown Tucson while shooting at them from the windows of his vehicle. In light of this evidence,

any additional information showing Pedrin's propensity for flight was merely cumulative. Moreover, as noted above, each of the five jurors who had learned about Pedrin's attempted escape had stated they could set aside what they had heard and decide the case on the facts presented at trial. The trial court was in the best position to assess their demeanor and credibility when they made those assurances. *See State v. Roque*, 213 Ariz. 193, ¶ 102, 141 P.3d 368, 395 (2006).[2] Accordingly, there is no reason to reverse on this basis.

Conspiracy

¶14 Count one of the indictment alleged that "[o]n or about the month of June 2002, [Pedrin and three other men had] conspired together to commit a class two felony." On the first day of trial, the court read the charge to the prospective jurors as follows:

> Count One is conspiracy to commit a Class 2 felony. That on or about the month of June, 2002, [Pedrin and his co-defendant] conspired to commit a Class 2 felony, to wit: armed robbery or kidnapping as charged in Counts Three or Four, in violation of the Arizona Revised Statutes.

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[2]We additionally note that because the asserted grounds for the mistrial were directly caused by Pedrin's own bad behavior during the trial, it arguably would be contrary to public policy to reverse the trial court's denial of a mistrial under these circumstances. *See generally Diaz*, 223 U.S. at 458 ("The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law [and] paralyze the proceedings of courts and juries."); *People v. Gambino*, 145 N.E.2d 42, 47 (Ill. 1957) ("It is unfortunate that the defendant participated [in the] escape but, having done so, he must bear the consequences of his folly. If this prejudiced the jurors against him on the . . . charge[s], the result was brought about by his own acts.").

The next day, the state moved to amend the indictment "to read exactly as the Court [had read the charge]." The trial court granted the motion without objection. The indictment was then amended to allege that Pedrin had "conspired . . . to commit a class two felony, to wit: Kidnapping (Count 3) and/or armed robbery (Count 4)."

i. Amendment of Indictment

¶15 Pedrin now claims he was deprived of his constitutional right "to be heard on the specific charges of which he is accused" because he did not personally consent to the amendment of the indictment. We disagree.[3]

¶16 "The purpose of an indictment or information is to give notice of the offense charged so that the accused may prepare a defense." *State v. Schwartz*, 188 Ariz. 313, 319, 935 P.2d 891, 897 (App. 1996). Prior to the presentation of evidence, however, "the trial court can amend an indictment upon an oral motion by the state if the defendant does not object." *Id*. In this case, Pedrin not only failed to object to the proposed amendment, but the record indicates his trial counsel explicitly consented to it, "thus waiving any argument that such amendment deprived [him] of notice." *Id*.

¶17 Pedrin cites *State v. Sanders*, 115 Ariz. 289, 564 P.2d 1256 (App. 1977), in support of his assertion that his personal consent was required. In that case, the defendant was charged with two counts of robbery and tried by the court rather than a jury. *Id*. at 290, 564 P.2d at 1257. After the presentation of evidence and "both sides had rested," defense

[3]The state urges this court to apply the doctrine of invited error to this issue. Because we resolve the issue on other grounds, we decline to do so.

counsel was incorrectly persuaded by the trial court, out of the defendant's presence, that aggravated assault was a lesser included offense of the robbery charge, *id*. at 291-92, 564 P.2d at 1258-59, and he consented to amending the indictment to include aggravated assault. *Id*. at 292, 564 P.2d at 1259. Upon learning of the amendment, the defendant objected to his attorney; he did not, however, alert the court to his objection and was convicted of aggravated assault. *Id*. at 292-93, 564 P.2d at 1259-60. On appeal, this court found, "under these circumstances," the defendant's personal consent to the amendment was necessary to satisfy due process notice requirements. *Id*. at 293, 564 P.2d at 1260. Virtually none of the operative circumstances in *Schwartz* is present here: the amendment was made prior to the presentation of the evidence, Pedrin was present during the proceeding, and he did not object to it. We therefore find that case inapposite.[4]

ii. Form of Verdict

¶18 The verdict form for the conspiracy charge allowed the jurors to find Pedrin guilty or not guilty of "conspiracy to commit a class two felony as alleged in Count One of the indictment." Prior to closing arguments, defense counsel objected to the form, claiming it would improperly permit the jury "to consider the sentence" by "indicat[ing] . . . the level

[4]Further, Rule 13.5(b), Ariz. R. Crim. P., provides that an indictment may be amended without the consent of a defendant to "remedy formal or technical defects." "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). The clarification of the objects of the alleged conspiracy can be fairly characterized as a technical or formal amendment, and Pedrin has not explained how it prejudiced him.

of offense[,] penalty-wise." He suggested the form "be modified to say . . . conspiracy to commit the kidnapping alleged in Count 3 or the robbery alleged to be committed in Count 4." The trial court denied that request and gave jurors the original form.

¶19 Pedrin contends, for the first time on appeal, that the verdict form for conspiracy was flawed because the jurors "had no evidence upon which to conclude that either armed robbery or kidnapping was a Class Two felony." He asserts that the jury, therefore, necessarily "engaged in bald speculation" in finding him guilty of that charge. Because he did not raise this issue below, we review this claim only for fundamental error. *State v. Burdick*, 211 Ariz. 583, ¶ 12, 125 P.3d 1039, 1042 (App. 2005). Fundamental error is error that goes to the foundation of the case, that takes from a defendant a right essential to his defense, and that deprives him of a fair trial. *Id*.

¶20 Contrary to Pedrin's assertion, the jurors were fully informed which crimes constituted the objects of the alleged conspiracy. As noted above, the verdict form asked the jurors to determine whether Pedrin had conspired "to commit a class two felony as alleged in Count One of the indictment." The amended indictment, which was in the jury's possession, alleged Pedrin had conspired "to commit a class two felony, to wit: Kidnapping (Count 3) and/or armed robbery (Count 4)." And in its final instructions, the court stated the objects of the alleged conspiracy were "armed robbery and/or kidnapping." Thus, the jurors were adequately informed that armed robbery and kidnapping were the class two felonies at issue in the conspiracy charge. *See State v. Stanley*, 123 Ariz. 95, 104-05, 597 P.2d 998,

1007-08 (App. 1979) (upholding conviction when jury instructions failed to specify object of conspiracy but object was specified in indictment). We find no error, much less fundamental error, in the form of verdict. *See Burdick*, 211 Ariz. 583, ¶ 12, 125 P.3d at 1042.

¶21 Pedrin also maintains the verdict form improperly "placed before the jury the subject of punishment, which was prejudicial and improper." We disagree. Although the verdict form indicated the objects of the alleged conspiracy were class two felonies, it did not inform the jurors of the potential punishment for a class two felony. Moreover, the trial court specifically instructed the jury that the "subject of penalty or punishment [was] not to be discussed or considered," and we presume the jurors followed that instruction. *See State v. Blackman*, 201 Ariz. 527, ¶ 65, 38 P.3d 1192, 1208 (App. 2002).

iii. Non-Unanimous Jury Verdict

¶22 Pedrin next claims he was denied his right to a unanimous jury verdict because the jury was instructed it could find him guilty of conspiracy to commit "kidnapping and/or armed robbery." He argues: "Since it is possible that some jurors based the conspiracy verdict on kidnapping, while others based it on armed robbery, there was no guarantee that the verdict was unanimous." We agree with Pedrin that the conjunctive-disjunctive wording of the conspiracy charge may have permitted the jury to render a guilty verdict on that charge even if they did not unanimously agree on the object or objects of the conspiracy. But this did not necessarily violate Pedrin's rights. *See State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d

624, 627 (1982) (defendant entitled to unanimous verdict on whether act was committed, not on precise manner in which it was committed); *see also People v. Vargas*, 110 Cal.Rptr.2d 210, 247 (Cal. Ct. App. 2001) (jury need not unanimously agree on object of conspiracy). We need not resolve this issue, however, because under the facts of this case, even assuming the instruction constituted error, it would not require the reversal of Pedrin's conviction.

¶23 In *State v. Stielow*, 14 Ariz. App. 445, 446, 484 P.2d 214, 215 (1971), the manager of an automotive repair garage took several hundred dollars as well as some checks from his employer's safe. He was subsequently charged with "grand theft . . . or in the alternative theft by embezzlement." *Id*. at 448-49. The jury found him guilty as charged and returned the following verdict: "We, the Jury . . . do find the Defendant guilty of Theft or Theft by Embezzlement." *Id.* at 449. On appeal, the defendant claimed the verdict form constituted fundamental error because "it is possible that there was not a unanimous verdict of guilt as to either offense." *Id*. In rejecting that argument, this court stated:

> We hold that under the facts of this case where there was but a single act and the proof thereof could well have supported a verdict of guilt of grand theft or a verdict of guilt of theft by embezzlement, and where the record affirmatively discloses that there was no objection to the form of verdict either before the same was submitted to the jury or after it was read to the jury in the court's instructions, and where the record is silent as to the matter having been presented to the trial court prior to the appeal, the error was not so fundamental as to require a reversal.

Id. at 450.

¶24 Here, the evidence at trial showed there was but a single act, *i.e.*, a single unlawful agreement at the heart of the conspiracy charge, and the proof at trial was without question sufficient to support a conviction based on either of the alleged objects. Further, as in *Stielow*, "there was no objection to the form of verdict either before the same was submitted to the jury or after it was read to the jury in the court's instructions, and . . . the record is silent as to the matter having been presented to the trial court prior to the appeal."[5] *Id*. Thus, assuming that instructing the jury using the conjunctive-disjunctive wording from the indictment was erroneous, and assuming further the error could be characterized as fundamental, Pedrin has not sustained his burden of establishing he was thereby prejudiced and entitled to reversal of his conviction. *See id.; see also State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005) (defendant must show fundamental error exists and caused him prejudice); *United States v. Hubbard*, 889 F.2d 277, 279 (D.C. Cir. 1989) (district court's failure to instruct jury to agree unanimously on object of conspiracy not plain error).

¶25 Moreover, as discussed earlier, Pedrin consented to the state's motion to amend the indictment to allege he had conspired to commit "kidnapping . . . and/or armed robbery." And prior to closing arguments, Pedrin expressly requested that the jurors be instructed that Pedrin had been charged with "conspiracy to commit the kidnapping alleged in Count 3 *or* the robbery alleged . . . in Count 4." (Emphasis added.). "It is well settled that a defendant

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[5]We note that Pedrin did object to the verdict form, but he did so on grounds other than the possibility of a non-unanimous jury verdict. In fact, as discussed *infra*, Pedrin specifically requested a verdict form with the disjunctive wording he now challenges.

who invite[s] error at trial may not then assign the same as error on appeal," *State v. Endreson*, 109 Ariz. 117, 122, 506 P.2d 248, 253 (1973), and "a party who participates in or contributes to an error cannot complaint of it," *State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982). Pedrin contributed to any error that might have occurred here when he consented to the wording at issue and proposed the jurors be so instructed, and he cannot now gain from it on appeal. *See State v. McMurry*, 20 Ariz. App. 415, 421, 513 P.2d 953, 959 (1973) (invited error may not be later assigned as error on appeal).

Theft and Burglary Convictions

i. Theft

¶26 Pedrin next challenges his conviction of theft by controlling stolen property, arguing it should be reversed because the trial court failed to instruct the jury on the elements of that offense. The state concedes that the omission of the instruction constitutes reversible error, and we agree. Although Pedrin failed to object during the trial, "a trial court has a duty to instruct on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence, even if not requested by the defense and failure to do so constitutes fundamental error." *State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). Accordingly, Pedrin's conviction for theft must be vacated.

ii. Burglary

¶27 Pedrin was convicted pursuant to count nine of the indictment of first-degree burglary of a non-residential structure. A person commits that offense by "[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein," A.R.S. § 13-1506, while "knowingly possess[ing] . . . a deadly weapon or a dangerous instrument," A.R.S. § 13-1508. The non-residential structure at issue in this case was H.'s vehicle, the Ford Taurus. *See* A.R.S. §§ 13-1501(10), (12); *see also State v. Hamblin*, 217 Ariz. 481, ¶¶ 9-12, 176 P.3d 49, 52 (App. 2008) ("nonresidential structure" includes an automobile).

¶28 Pedrin argues that, because the jury did not receive a theft instruction, and "no specific felony other than theft was alleged" to support the burglary charge, this conviction should be reversed. We have previously determined, however, that a trial court need not instruct the jury on the definition of the predicate offense for a burglary conviction when that predicate offense is theft. *State v. Belyeu*, 164 Ariz. 586, 589-90, 795 P.2d 229, 232-33 (App. 1990). In *Belyeu*, this court found that "theft is a common term" and that, when it is "invoked as the basis for a burglary conviction, [it] need not be defined." *Id.* This is consistent with the well-established rule that "[a] trial court is not required to define every phrase or word used in the instructions, especially when they are used in their ordinary sense and are commonly understood." *State v. Eastlack*, 180 Ariz. 243, 259, 883 P.2d 999, 1015 (1994); *accord State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988).

¶29 Pedrin urges us to overrule our decision in *Belyeu*, *citing State v. Schad*, 142 Ariz. 619, 620-21, 691 P.2d 710, 711-12 (1984), in which our supreme court reversed the defendant's conviction for felony murder because the jury had not been instructed on the elements of the underlying felonies, first-degree murder based on robbery and kidnapping. The court there stated:

> [T]he jury was informed that it could convict Schad of the first-degree murder if it found the murder was committed during a felony, yet inexplicably, no underlying felony was defined. Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence. Knowledge of the elements of the underlying felonies was vital for the jurors to properly consider a felony murder theory. This was absent.

Id. (citation omitted). Unlike here, the underlying crimes in *Schad* have specific, statutory definitions that may not align exactly with their commonly understood meanings. Although theft, too, is a statutorily defined term, it is a commonly understood one and, as noted above, it need not be defined when it is the predicate offense to a burglary charge. *See Belyeu*, 164 Ariz. at 589-90, 795 P.2d at 232-33; *accord Ex parte Hagood*, 777 So.2d 214, 219 (Ala. 1999) (reaching same conclusion; listing other jurisdictions that are in accord). We therefore find no error with the court's failure to define theft.

Excessive Sentence

¶30 Pedrin was sentenced to a combination of concurrent and consecutive prison terms totaling 110.5 years. He argues the "imposition of aggravated consecutive sentences totaling over 100 years serves no justiciable purpose" and is "unconstitutional pursuant to the

cruel and unusual clause of the United States and Arizona Constitutions." Because Pedrin does not allege the sentences were outside the statutory range, we review the sentences for an abuse of the trial court's discretion. *See State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984).

¶31 The Eighth Amendment to the United States Constitution prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. Although it is possible that a sentence of imprisonment for a term of years that is within statutory parameters might nevertheless violate this prohibition, "courts are extremely circumspect in their Eighth Amendment review of prison terms. The Supreme Court has noted that noncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are '["]grossly disproportionate["]' to the crime." *State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006), *quoting Ewing v. California*, 538 U.S. 11, 20 (2003), *quoting Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment). "Under this analysis, a court first determines if there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense [to] the harshness of the penalty.'" *Berger*, 212 Ariz. 473, ¶ 12, 134 P.3d at 381, *quoting Ewing*, 538 U.S. at 28.

¶32 Pedrin asserts the imposition of consecutive, aggravated prison terms created a penalty grossly disproportionate to his crimes. A defendant, however, "has no constitutional right to concurrent sentences for . . . separate crimes involving separate acts."

State v. Jonas, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990); *see also* A.R.S. § 13-116. "Accordingly, as a general rule, this court 'will not consider the imposition of consecutive sentences in a proportionality inquiry.'" *Berger*, 212 Ariz. 473, ¶ 27, 134 P.3d at 384, *quoting State v. Davis*, 206 Ariz. 377, ¶ 47, 79 P.3d 64, 74 (2003). "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Berger*, 212 Ariz. 473, ¶ 28, 134 P.3d at 384. And although Pedrin also contends the aggravation of his sentences led to a disproportionate penalty, this claim is based on the fact that the aggravated sentences are to be served consecutively. Because Pedrin does not claim that any one sentence was grossly disproportionate to the crime for which it was imposed, no proportionality inquiry need be conducted.[6]

¶33 We note, however, the evidence at trial showed that Pedrin, with premeditation, bound and tortured two physically infirm persons for pecuniary gain. He then drove

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[6]Additionally, although the issue is not explicitly raised by Pedrin, the trial court did not abuse its discretion by imposing aggravated terms here. A trial court may "consider and articulate any factor affecting the aggravation or mitigation of a sentence" that it deems appropriate, and, "[i]f sufficient and appropriate aggravating circumstances exist to justify imposition of an aggravated sentence, we will find no abuse of discretion in the trial court's decision to impose such a sentence." *State v. Long*, 207 Ariz. 140, ¶¶ 36-37, 83 P.3d 618, 625 (App. 2004). Here, the trial court properly found the following constituted aggravating circumstances:

> The offenses were committed for pecuniary gain; they were committed, the offenses, while you were on probation; there's an extensive criminal history in the record; the use of the stun gun and what have you was a vicious, cruel thing to be doing, depraved thing to be doing. You are a danger to society.

recklessly at high speeds through city streets, shooting from his vehicle's windows at pursuing patrol cars. These actions created incalculable peril not only to pursuing police but to anyone in his path and demonstrate a highly culpable mental state; indeed, it is a marvel that no deaths or serious injuries resulted. Thus, even were we to consider the fact that consecutive, aggravated prison terms were imposed in conducting a proportionality inquiry, we would not find the penalty imposed here to be unconstitutionally disproportionate to the crimes. *See State v. Davis*, 206 Ariz. 377, ¶ 47, 79 P.3d 64, 74-75 (2003) (discussing when consecutive sentences may be considered in proportionality inquiry); *cf. Ewing v. California*, 538 U.S. 11, 23 (2003) (rejecting Eighth Amendment challenge to prison term of twenty-five years to life for recidivist offender convicted of stealing three golf clubs); *Harmelin v. Michigan*, 501 U.S. 957, 994-97 (1991) (rejecting Eighth Amendment challenge to mandatory sentence of life imprisonment without parole for first-time offender for possession of 672 grams of cocaine); *Wigglesworth v. Mauldin*, 195 Ariz. 432, ¶ 17, 990 P.2d 26, 31 (App. 1999) (rejecting Eighth Amendment challenge to three consecutive life sentences for two counts of possession of a narcotic drug for sale and one count of transportation of a narcotic drug for sale).

Imposition of Aggravated Prison Terms

¶34 Pedrin also claims his right to a jury trial and due process, as established in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466

(2000), were violated when the trial court imposed aggravated terms based on "factors which were not found beyond a reasonable doubt by a jury." We disagree.

¶35 It is now well established that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. As this proposition pertains to Arizona's sentencing scheme, our supreme court has stated:

> There are three ways an aggravating factor can constitutionally increase a maximum sentence. A jury can find the aggravating factor beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. The defendant can waive his *Apprendi* rights by stipulating to "the relevant facts or consent[ing] to judicial factfinding." *Blakely*, 542 U.S. at 310, 124 S.Ct. 2531. Finally, either the judge or the jury can find "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

State v. Price, 217 Ariz. 182, ¶ 10, 171 P.3d 1223, 1226 (2007). If a sentencing judge finds the fact of a prior conviction constitutes an aggravating circumstance, "'the Sixth Amendment permits [him or her] to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute.'" *Id.* ¶ 15, *quoting State v. Martinez*, 210 Ariz. 578, 583 ¶ 26, 115 P.3d 618, 625 (2005).

¶36 In this case, the parties stipulated during trial that Pedrin had a prior felony conviction. And during the sentencing hearing, the trial court listed Pedrin's "extensive criminal history" as an aggravating circumstance. Because the court found the fact of a prior conviction as one circumstance, Pedrin was not entitled to have the jury find the other aggravating circumstances. *See Price*, 217 Ariz. 182, ¶ 15, 171 P.3d at 1226. Although

Pedrin urges this court to overturn the "one is enough" approach established by our supreme court, claiming it "violates the spirit of *Blakely*," we lack the authority to do so. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

Reasonable Doubt Instruction

¶37 Last, Pedrin argues that the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995) is unconstitutional. Our supreme court has repeatedly rejected similar challenges to the *Portillo* instruction. *See, e.g., State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). As noted above, we have no authority to overrule the decisions of our supreme court, *see Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d at 1009, and we need not address this argument further.

Disposition

¶38 Pedrin's conviction and sentence for theft is reversed; his remaining convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge